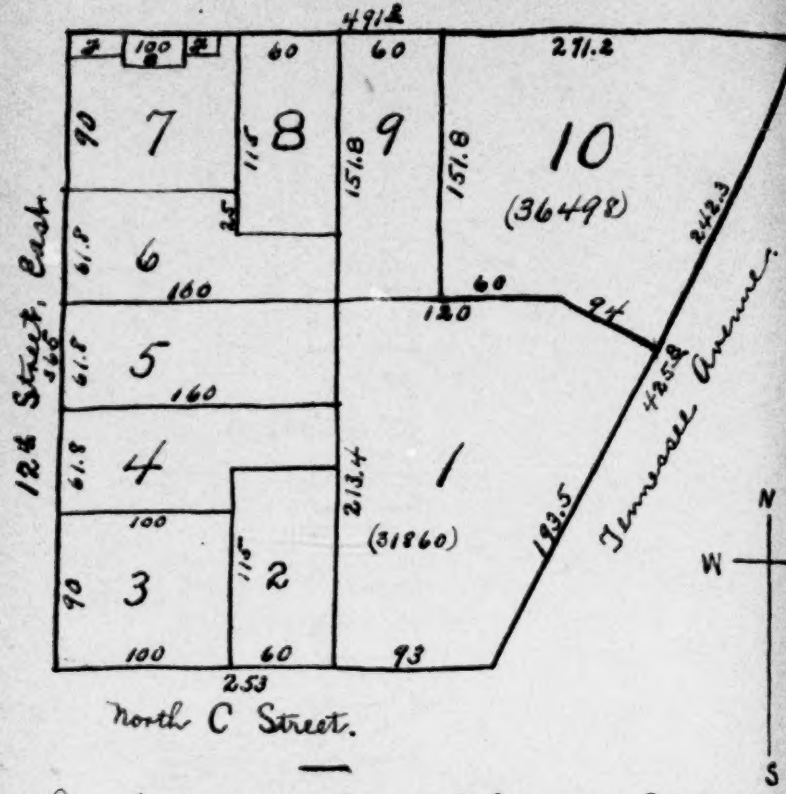
Plat of Square 1031

Showing original lot 10, the lot involved in this suit.



In the Supreme Court of the United States.

No. 246 October Term 1898.

Davis et al vs. Hoblens et al.

Exhibit to Brief for Plaintiffs in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1898.

No. 246.

LUCY T. DAVIS ET AL., PLAINTIFFS IN ERROR,

vs.

LOUIS COBLENS, TRUSTEE, ET AL., DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF FACTS.

Plaintiffs in error brought this action of ejectment in the supreme court of the District of Columbia to recover $\frac{99}{100}$ undivided part of original lot ten (10), in square 1031, situate in the city of Washington, District of Columbia.

Plaintiffs and defendants both claimed from a common source of title, viz., Richard Young.

The plaintiffs claimed, and gave evidence tending to show, that he died, seized of said lot, July 30, 1860, leaving a last will, and that by the residuary clause thereof said lot passed to his widow, Matilda Young, for life, and on her death

October 7, 1874, to his children, (1) Lucy A. M. Bevans, (2) Tracenia Latimer, (3) Sophronia Magruder, (4) Elizabeth T. B. McCormick, and (5) Brook W. Young.

Of these children Lucy A. M. married John T. Bevans prior to the death of her father. She died in 1875, leaving her husband, who still survives her, and certain children and grandchildren whose names are set out in the record (R., 5).

Tracenia Young married Edwin Latimer in the lifetime of her father and died November 15, 1879, leaving her said husband surviving her, who died April 20, 1880. Tracenia left two children surviving her, the plaintiff Lucy T. Davis, who married Americus Davis prior to the death of her grandmother, the life tenant, Matilda Young. The other child is Charles M. N. Latimer.

Sophronia Young married Richard Y. Magruder before the death of said life tenant, Matilda Young, and died about the year 1880 or 1885, having survived her said husband and leaving two children, viz., Ella, who married Samuel Cox, in the lifetime of said Sophronia, and Richard Y. Magruder.

Elizabeth T. B. Young married Alexander McCormick in the lifetime of her father and died March 22, 1889, leaving her said husband surviving her, who died July 2, 1891.

Brook W. Young is still living.

Elizabeth T. B. McCormick, daughter of Richard Young, united with her husband in a deed, dated February 28, 1887, of all their interest in the lands of which Richard Young died seized, of which said lot was a part, to their son, Millard P. McCormick, who is one of the plaintiffs.

On the trial plaintiffs struck out as plaintiffs William W. Boarman and Charles M. N. Latimer. Evidence was given tending to show title in the remaining plaintiffs as follows:

Lucy T. Davis' title: On the 28th of February, 1887, she conveyed all her interest in the lands of which Richard Young died seized, of which lot ten was a part, to John H.

Walter. On the 25th of October, 1892, said Walter reconveyed to her all of said interest except that which he had in the interval conveyed to others, lot ten being one of the lots which he had not in said interval conveyed.

Millard P. McCormick's title: By deed from his mother and father above recited.

The Virginia-Alabama Company claimed by mesne conveyances from other heirs of said Richard Young.

The title claimed by the defendants was by adverse possession under a colorable execution deed from Tench Ringgold, the marshal of the District of Columbia, dated March 8, 1826, to Anthony Holmead, Jr., and by mesne conveyances from him to the defendants.

All the evidence being closed, the plaintiffs, then contending that the defendants had given no evidence *legally sufficient* to show an adverse possession of said lot 10 for the full uninterrupted period of twenty years, prayed the court to grant the following instructions, all of which were refused or modified as noted:

Instruction No. 1.

"The jury are instructed that the uncontradicted evidence in this case shows that Childs entered in the possession of the lot in controversy not earlier than the eight-day of March, 1875, and continued in such possession until about November, 1893, when he vacated said lot and square 1031, having about a year previously made a deed of said lot to the defendants in this case, and that there is no testimony in this case that said lot 10 was in continuous occupancy of any one from the period of such vacation by Childs down to the seventh day of March, 1895, and therefore the defendants in this case have not shown such an adverse possession of said lot 10 by themselves and said Childs, under whom they claim, for the full period of twenty years, and their verdict must therefore be for the plaintiffs."

Refused.

Instruction No. 2.

"The jury are instructed that the plaintiffs have proven a *prima facie* record title to the lot in controversy down to the time of filing of their suit; and they — further instructed that in order to divest the plaintiffs of their said record title to said lot 10 the defendants in this case must show a continuous possession by themselves and Childs of said lot 10 for the full period of twenty years from the eight-day of March, 1875, and that such possession must not only have been continuous, but it must have been actual, exclusive, open and notorious, and hostile to the plaintiffs in this case for said period of twenty years; that if at any time during said twenty years said lot 10 was not in the actual occupancy, as stated, of Childs or some one claiming under him, then the defendants have not established such an adverse possession of the property, and there is no evidence in this case tending to show an adverse occupancy or possession by the defendants or their tenants from the time Childs vacated said lot 10 down to the seventh day of March, 1895, as the law requires, and they must find for the plaintiffs."

Refused.

Instruction No. 3.

"The jury are instructed that the defendants in this case claim title with the plaintiffs from a common source, to wit, from Richard Young. The defendants are therefore not permitted to deny, nor can the jury find, that said Richard Young was not the owner of this lot 10 at the time of the marshal's deed to Holmead, and that the said deed of the marshal to Holmead is void and passed no title to Holmead or to any person claiming under him. As the defendants therefore claim under Richard Young, through said Holmead, their paper or record title is invalid, and the only title, if any, which they can show to this lot 10 is a title by adverse occupancy for the full and uninterrupted period of twenty years, as defined in instruction No. 2, and that there is no evidence in this case tending to show such adverse occupancy for said twenty years, and that their verdict must therefore be for the plaintiffs."

Refused.

Instruction No. 4.

"The jury are instructed that no adverse possession of lot 10 has been shown against any of the plaintiffs who claim under Tracenia Latimer and Elizabeth T. B. McCormick, and their verdict must therefore be for the plaintiffs, at least as to the interests which they claim under those persons."

Refused.

Instruction No. 5.

"The jury are instructed that they cannot find that the machinery was on any part of lot ten from the testimony of a witness who says, 'I don't know but what the rollers might have been on lot ten.'"

Refused.

Instruction No. 6.

"The jury are instructed that there is no testimony in this case tending to rebut the testimony of the witness John H. Walter that he never conveyed lot ten, in controversy in this case, to any person other than the conveyance by the deed to plaintiffs, Charles M. N. Latimer, Lucy T. Davis, and others, and the jury would not be justified in finding to the contrary."

"But the court refused to grant said instruction as prayed, but modified it by striking out the words 'and the jury would not be justified in finding to the contrary,' and by adding in lieu thereof the words 'and the weight to be given his testimony is a proper question for the jury.'"

The court then granted the following instructions at the instance of the defendants:

1.

"If the jury believe from the evidence that the defendants and those under whom they claim were in actual, exclusive, open, notorious, continuous, and hostile possession of the ground in controversy in this suit for twenty years before the institution of this suit, claiming it as their own, their verdict should be for the defendants."

2.

"Unless the jury shall find that each of the plaintiffs, under the plaintiffs' declaration as amended, is entitled to recover, their verdict should be for the defendants."

The granting of each of which was duly excepted to by the plaintiffs.

On the verdict, which was for the defendants, judgment was entered, and on a writ of error to the Court of Appeals of the District of Columbia the judgment was affirmed and the case is now here on a writ of error to the last-named court.

ASSIGNMENTS OF ERROR.

The court erred as follows:

1st. In permitting the defendant to cross-examine the witness Walter in the manner set forth on pages 9 to 14 of the record and to which the objections of the plaintiffs are there noted.

2d. In admitting in evidence the docket entries set forth on page 17 of the record.

3d. In refusing to grant plaintiffs instruction numbered one.

4th. In refusing to grant plaintiffs instruction numbered two.

5th. In refusing to grant plaintiffs instruction numbered three.

6th. In refusing to grant plaintiffs instruction numbered four.

7th. In refusing to grant plaintiffs instruction numbered five.

8th. In refusing to grant plaintiffs instruction numbered six as prayed; and

9th. In giving to the jury the said instruction numbered six, with the modification thereof made by the court.

10th. In giving to the jury the first instruction on behalf of the defendants and set out on page 22 of the record.

11th. In giving to the jury the second instruction on behalf of the defendants and set out on page 22 of the record.

ARGUMENT.

FIRST, EIGHTH, AND NINTH ASSIGNMENTS.

These assignments relate closely to each other, and with leave of the court we shall discuss them together.

For the purpose of showing title in the plaintiff Lucy T. Davis as to the share claimed by her, the title to an undivided interest in a number of lots, including lot 10 (the lot in controversy), was in the deraignment of title shown to be in one John H. Walter by a deed in fee executed to him by said Lucy T. Davis *et al.* (Rec., 6) on the 28th day of February, thereupon there was offered in evidence a subsequent deed in fee from said Walter to Lucy T. Davis and others (R., 6) reconveying "all those lands and tenements" which were conveyed by said Lucy T. Davis and others by said prior deed, which prior deed included lot 10. The deed from Walter, however, excepted from his deed of reconveyance "so much of all the lands and tenements above mentioned (being the land conveyed to him by the deed from said Lucy T. Davis *et al.*) as had been conveyed by the party of the first part (Walter) to *other persons* prior to the filing of a bill in equity cause 11637 (Cox *vs.* Walter) of the supreme court of the District of Columbia."

There were other exceptions in the deed, but they are of no relevancy to the questions now before the court.

Inasmuch as this deed of reconveyance from Walter to

Lucy T. Davis did not mention in terms any of the land conveyed, but simply described it as all the land conveyed to him by a former deed of his said grantee, Davis, *excepting* from his reconveyance such of said land as he had in the *interval* conveyed "to *other persons*," it became necessary in making out the plaintiff Lucy T. Davis' title to show that lot 10 which had passed by the prior deed of Lucy T. Davis *et al.* to Walter had not in the interval been conveyed "to other persons." It was not, of course, practicable to offer in evidence *all* the deeds ever made by Walter in the interval, and thus show that none of them conveyed lot 10. To establish, therefore, the negative fact that he had made no such conveyance he was called to the witness stand and he testified that this reconveyance was the *only* conveyance he had ever made of said lot 10. This was the *only* fact testified to by him and the only fact for which he was called to the stand (R., 8). On the cross-examination, however, the witness was conducted over an examination covering six pages (R., 9 to 14) of the printed record and covering innumerable subjects having not the slightest relevancy to the examination-in-chief. None of this examination was directed to impeach the veracity of the witness. It was for one purpose, and no other, viz., of getting into the jury box a prejudice of some sort against the witness by cunningly put questions charging the witness, without the slightest basis of fact (and it was immaterial, to affect his credibility, whether it was a fact or not), that he had been buying up "the interest in property from heirs of persons long since dead," said persons having no pretence of a connection with the heirs of Richard Young. It is plain that although the witness Walter was in no way interested in the suit brought by the present plaintiffs, yet it was sought thus unfairly to prejudice in some way the case of the plaintiffs by bringing the jury to believe that the title under which plaintiffs claimed was a title "bought up from the heirs of persons long since dead."

The admission of all of this evidence on cross-examination was excepted to, and the exceptions, as the record (R., 9 to 14) shows, were saved to the plaintiffs.

This ruling of the court in permitting this line of cross-examination constitutes the first assignment of error.

Of course this was diverting the jury from the real issue. The cross examination was not made in good faith, and it was, we respectfully submit, an *abuse* of the discretion which the law reposes in the trial judge to permit it to go on over the repeated objections of plaintiffs' counsel. Even the Court of Appeals said of this cross-examination:

"The complaint here made is that the cross-examination was chiefly [the court should have said 'solely'] for the purpose of showing that the witness was a dealer in speculative titles in order to prejudice the jury against him, and through him against the case of the plaintiffs. *If such was the purpose it would have been the duty of the court to refuse it, but while we are inclined to think that the cross-examination went too far,* we cannot say that there was an abuse of discretion in permitting it that would justify the reversal of the judgment."

Observe that the court says, "If such was the purpose." We submit in all candor that the vicious purpose of this cross-examination is as palpable as it could possibly be made without openly confessing it. The argument of counsel for defendants that it was designed to show, in spite of the positive assertion of the witness that he had *not* conveyed lot ten, that he might perchance be *mistaken* about it because he had made many conveyances of other lots in this city, is as thinly veiled a piece of sophistry as can well be imagined when we consider how easy it would have been for the defendants' counsel to have produced *the recorded deed*, if any such existed, and thus at once have stamped with falsity the witness' testimony. It is plain that defendants *knew* there was no such deed of record, else they would have produced it. It is no answer to say there might have been

a deed and not a recorded deed, for if it was not of record it was the same under our recording acts as to the defendants as if it had no existence. So we say that this cross-examination was palpably vicious in its purpose, and no one can say with *judicial certainty* that it did not prejudice the plaintiffs' case before the jury and lead them to reverse the rule of law that all facts in a case where the defense is of adverse possession must be clearly made out beyond a doubt—that is to say, that all doubts must be solved *against* the party who sets up such an affirmative defense.

We, of course, are aware of the general rule that allowance of questions upon cross-examination is a matter for the discretion of the trial court and is not generally the subject of review on writ of error, but there are well-settled exceptions to this rule, one of which is that if permitting the question worked, or might have worked, serious injury to the complaining party, it is error for which the judgment will be reversed:

"The rule has long been settled that the cross-examination of a witness must be limited to the matters stated in his direct examination. If the adverse party desires to cross-examine him as to other matters he must do so by calling the witness to the stand in the subsequent progress of the cause" (Houghton *vs.* Jones, 1 Wall., 702, 706, and see the Ottawa case, 3 Wall., 268; Phila., &c., *vs.* Stimson, 14 Pet., 448).

"In Wills *vs.* Russell, 100 U. S., at p. 626, it was said by this court that permitting a cross-examination of a witness to matters not called out on the direct examination is a matter for the discretion of the trial judge and is not a ground of error '*unless it appeared that it worked serious injury to the opposite party.*'

"The court must have the power to control the whole matter [of cross-examination] in the exercise of a sound discretion. *If that discretion be abused, correction of the abuse must be sought in the appellate court*" (Rice on Evidence, vol. 2, p. 598).

The effect of permitting such a cross-examination despite the repeated objections of counsel was bad enough, but it was made infinitely more so by the subsequent extraordinary ruling of the court in modifying, as it did, the plaintiffs' sixth instruction (see eighth and ninth assignments), to wit:

"The jury are instructed that there is no testimony in this case tending to rebut the testimony of the witness John H. Walter that he never conveyed lot 10 in controversy in this case, to any person other than the conveyance by the deed to plaintiffs, Charles M. N. Latimer, Lucy T. Davis and others, and the jury would not be justified in finding to the contrary."

This instruction the court refused to grant as prayed, but insisted, over the objection of plaintiffs' counsel, upon striking out the perfectly proper words "and the jury would not be justified in finding to the contrary" and in their place inserting the words "*and the weight to be given his testimony is a proper question for the jury.*"

"It is error for the court to direct attention to a particular witness and instruct the jury as to their right to weigh his testimony."

Thomson on Trials, § 2421.
Dwyer *vs.* Bassett, 63 Tex., 277.
Crutchfield *vs.* Richmond R. R., 76 N. C., 320.

Consider for a moment the *effect* of these substituted words, taken with the previous conduct of the court in permitting a cross-examination which even the Court of Appeals felt impelled to say "went too far." Its thinly veiled purpose was palpable to the jury, and they were led to believe by the judge permitting it to be done over the plaintiffs' persistent objections that it was a *legitimate* purpose. With this in their minds, the evident *leaning* of the judge became law with the jury, and the nail was clinched in the coffin of the plaintiffs' case by his singling out the witness from all the other witnesses and telling them (the jury) that

the *weight* to be given that witness' testimony was a proper question for them to consider. Who had contradicted Walter? Who had said he was not truthful? Who had given the slightest scintilla of evidence tending in the remotest way to throw doubt upon his positive statement, repeated over and over again, that he *knew* he had not conveyed lot 10? No one. Not even an attempt was made to show the contrary. This attempt, therefore, of the court to throw an *atmosphere* of doubt upon his testimony by such an instruction, accompanied with the court's previous exhibition of a strong leaning (by permitting this cross-examination), would have been fatal to almost any case. Jurymen are neither lawyers nor logicians. In any case of doubt as to a fact the slightest token of the judge's leaning, even when he does not intend it to have that effect, sways their minds for or against a case, and we say emphatically, therefore, that the action of the trial court in these rulings as to Walter's testimony was practically (whatever its intention or lack of intention) a *suggestion* to the jury that it would be justified in disbelieving the testimony of the witness, although his credibility had not in the slightest manner been impeached. Can a court do this and obtain the sanction of an appellate tribunal jealous in its care of the functions of the jury? All the authorities say it is error. Observe that the plaintiff had offered at least *prima facie* evidence by the testimony of Walter that he had not conveyed lot 10, and until it was contradicted by *some* testimony tending to show the contrary it should have been considered *a proven* fact in the case. This court has said so on more than one occasion.

"*Prima facie* evidence of a fact is such evidence as in judgment of law is sufficient to establish the fact; and if not rebutted, remains sufficient for the purpose. The jury are bound to consider it in that light; unless they are invested with authority to disregard the rules, by which the liberty and estate of every citizen are guarded and supported. No judge would hesitate to set aside their verdict and grant a new trial if, under such circumstances, without

any rebutting evidence they disregard it. It would be error on their part which would require the remedial interposition of the court. In a legal sense, then, such *prima facie* evidence, in the absence of all controlling evidence or discrediting circumstances, becomes *conclusive* of the fact; that is, it should operate upon the minds of the jury as *decisive* to found their verdict as to the fact. Such are understood to be the clear principles of law on this subject."

Story, J., in Kelly *vs.* Jackson, 6 Pet., 622.
United States *vs.* Wiggins, 14 Peters, 334.

"The proposition that the jury have the right to disbelieve such witnesses as, in their judgment, under all the circumstances of the case, are unworthy of belief is not law. The jury, although they are the judges of the credibility of witnesses, *have no right to arbitrarily disbelieve* the testimony, unless where the witness has wilfully and knowingly sworn falsely to material facts in the case."

Evans *vs.* George, 80 Ill., 51.

"The court, at the instance of the plaintiffs, instructed the jury, 'that they are the judges of the credibility of witnesses and of the weight of evidence. They may believe and accept or disbelieve any testimony which, under all the circumstances of the case, is not credible and entitled to weight in deciding the issue in this case.' This is entirely too comprehensive in its terms. The jury are at liberty to disbelieve the evidence of a witness who has been impeached in any of the modes recognized by the law for impeaching witnesses, which may include not only direct contradictions and evidence of bad character, but also the inherent improbabilities of his statements and his manner and appearance while testifying; but they cannot be allowed to go beyond this, and determine for themselves that other circumstances, not within legal contemplation, tending to impeach the witness, show that his evidence is impeached, and therefore entirely disregard it."

Hartford Life Ins. Co. *vs.* Gray, 80 Ill., 31.
And see Wickliffe *vs.* Lynch, 36 Ill., 210.

In Drew *vs.* Watertown Fire Ins. Co., 6 South Dakota, 335, defendants' counsel contended that "the jury had

the right to discredit the witness Patterson and his testimony concerning the sale of intoxicating liquors in the building covered by the policy. It was within the province of the jury to believe or disbelieve this testimony." The court, commenting on this proposition, said :

"This right conceded, would lack little of making the jury judicially omnipotent, for what the jury may rightfully do the court may not rightfully undo. While courts are, and ought to be, careful not to invade the province or abridge the right of the jury to determine questions of fact, yet the jury has little to do *where there was no question of fact in dispute upon the evidence, or upon the inferences which they are at liberty to deduce therefrom ;* but a jury is not at liberty to arbitrarily and without reason, reject or discredit the testimony of a witness. A jury is entitled to wide latitude in passing upon the credibility of witnesses, but its power is not unlimited. *The testimony of this witness was not all improbable in itself. The fact to which he testified was not disputed. It was of a character that if untrue it could easily have been disproved* [as in the case at bar where the record could easily have been produced had it existed]. He was not shown to have been in any manner interested. Under such circumstances there was nothing upon which the jury could reasonably base a rejection of his testimony."

SECOND ASSIGNMENT.

The court erred in admitting the docket entries. It was not in any way shown what connection *Anthony* Holmead, the judgment creditor mentioned in said entries, had with the case. The party secured by the trust from Richard Young to Bradley was *James B.* Holmead. It is therefore difficult to see what legal relevancy these docket entries had to the case. The trust to Bradley was to secure an indebtedness of $1,792 payable *on or before* November 2, 1820, whereas the judgment mentioned in said entries was obtained by Anthony Holmead long before that date, to wit, December 18, 1818, and therefore could not have been for that indebtedness, for, as the record (p. 16) shows, *it was not*

then (date of judgment) *due*, and, moreover, the amount of the judgment, $1,200, and the amount of the debt secured, $1,792, was entirely different. It also appears that while the judgment creditor was *Anthony* Holmead, yet the purchaser of the land under the execution sale was Anthony Holmead, *Junior*, and no attempt was made to show that these two Holmeads were identical, and the presumption is that they were not. The admission, therefore, of this evidence might well have prejudiced the plaintiffs' case with the jury by leading them to believe that Richard Young had in some way morally lost the right to his land by failing to pay this judgment, and that the defendants were morally entitled to claim a benefit from the fact that this judgment had been entered up against Richard Young and a levy made upon lot 10 and other lots in consequence, although at the time of said levy the legal seizin of the land was in Bradley, the trustee under the trust. It need hardly be argued that it is not proper to throw into the jury-box irrelevant evidence for no other purpose than to create *prejudice* against one of the parties and *sympathy* for the other. It is a vicious practice which should be condemned as it deserves, to say nothing of the error which the court commits in permitting it to be done.

THIRD, FOURTH, FIFTH, AND SEVENTH ASSIGNMENTS.

The refusal to grant instructions Nos. 1, 2, and 3 of the plaintiffs raises the question whether the defendants had offered any *legally sufficient* evidence of a continuous adverse possession of lot 10 from March 8, 1875, to March 8, 1895, for if they had not, the instruction plainly should have been granted. This therefore brings us to a consideration of the defendants' evidence, which we quote now in its entirety upon this question of adverse possession, putting in italics such portions as we deem important to be noted in making an analysis thereof:

"The defendants thereupon further offered evidence tending to prove that on March 8, 1875, Isaac P. Childs & grantee of the whole of square 1031 under a deed from Alexander R. Shepherd, bearing date the 22nd day of February, 1875, the same being one of the chain of conveyances offered in evidence by the plaintiffs as tending to show a common source of title, took possession of the whole of said square, converted it into a brick yard, and continued to hold and use it as such, openly, notoriously, exclusively, continuously, and in a manner hostile to all the world, until January, 1892, when he and his immediate grantees sold and conveyed the said square as an entirety to the defendants for sixty-seven thousand dollars, of which thirty thousand was paid in cash and thirty-seven thousand dollars, deferred purchase-money, was secured upon the ground by a deed of trust, upon which the defendants have ever since paid the interest; that by the terms of the sale said Childs & Sons were to be allowed until February, 1893, to remove from said square; that they continued in occupation and possession of the whole of said square under said defendants, paying rent therefor down to the month of October, 1893, with the consent of said defendants, and that they held said square for some time after October *without the consent of the defendants*, but not disputing their title, being tenants holding over; that they removed the greater part of their effects from said square in the late fall or early winter of 1893–'94, but did not remove entirely until about the month of May, 1895; that the first structure placed by them on the square when they took possession in 1875 were two or more brick kilns erected on lot 10, and that these kilns were the last from which the brick were removed when they left; that these brick were in process of removal along during the winter of 1893–'94, and that a part of the machinery used by them in the making of brick, namely, two large rollers, with which the clay was crushed before being made into brick, were not removed until May, 1895; that these rollers and some machinery were hauled away in two four-horse wagons as late as about May 20, 1895; that the machine-house was located on the *north part of lot 1 in said square*, at or about a point indicated by the witness Charles Childs on a plat of the square exhibited to the jury, and that the rollers and machinery were north of

the machine-house; and on cross-examination in regard thereto the said Charles Childs testified as follows:

"'*I don't know but what the rollers might have been on lot 10.* The machine-house stood right in here (indicating), and *the rollers might have been on lot 10.*'

"The defendants further offered testimony tending to show that in November, 1893, the defendant caused four signs to be posted, each about four feet square, to the effect that the entire square was for sale or rent on application to them, one at each corner of the square, one of them being located on lot 10; that some of the old brick were left on the ground, which the witness thought Childs & Sons *abandoned*, but they did not charge defendants for them, which were suitable for use in building, and were still there; *that defendants made no use of them*, but that witness thought they would have used them if they had gone into building operations; that either in the latter part of March or the first part of April, 1894, the defendants rented the entire square to one John A. Downing, who rented it for the purpose of converting it into a base-ball park, *but did not use it for that purpose;* that he occupied the house which was on lot 7 for a dairy lunch and sublet a portion of said house for a barber shop; that the acts he did in reference to the occupation of the vacant ground in that square were as follows: That he prevented various parties from depositing tools, tool-boxes, and railroad iron on the square, though *none was attempted to be deposited on lot 10;* that on the said square there were a couple of holes where the brick kilns had existed, and that there are the foundations of some kilns built of brick still there, and that the said Downing remained as such tenant in occupation of the said square, as aforesaid, until June 1895, when he sold his dairy lunch to a Mrs. Schulz, who took possession the same day; that after Isaac Childs and Sons left the square, which was in the winter of 1893–'4, perhaps along in November, December, January and February, they sold certain brick kilns, some of which were on lot 10, to James D. Childs, who in turn sold them to others, by whom they were taken away; *that said James D. Childs did not claim the land said bricks were on;* that Mrs. Schulz continued in occupation of the property from June, 1895, down to the time of the trial; that she rented the house with the privilege of using the entire square, provided she neither placed nor permitted others to place anything un-

lawful upon it, and that she had stopped parties from dumping earth upon the square and from driving across it, *though she made no use of it herself.*

"The defendants thereupon produced as a witness in their behalf Goff A. Hall, assistant assessor of the District of Columbia, who gave testimony tending to prove that he had examined the tax books from 1875 down to the time of the trial, and that throughout that period the taxes on said lot 10 had been assessed and paid in the name of the defendants and those under whom they claimed.

"Thereupon the plaintiffs in rebuttal gave testimony tending to prove that the brick yard was established some time in the fall of the year 1875 and disappeared some time in 1893, leaving nothing remaining but the remnants of the old brick yard, and that the bricks were all removed from the kilns about March or April, 1894."

Analyzing the foregoing, we see that it tends to show that on the 8th of March, 1875, Isaac P. Childs took possession of the whole square 1031, in which lot 10 is situated, and that he continued with his grantees to hold and use said square as a brick yard "until January, 1892," when it was sold to the defendants under an agreement that Childs & Sons were to be allowed until February, 1893, to remove from the square, but in point of fact Childs & Sons continued in possession until October, 1893, *without the consent of the defendants.* During the period, therefore, from February, 1893, to October, 1893, the square was in the possession of parties *making no claim to it whatever*, nor were the defendants in occupation of it by Childs as their tenants. The statement in the record that they were "tenants holding over" is a statement of law not justified by the facts. They were not there as tenants, *but as trespassers*, claiming no right whatever in this land or pretending to be there by the permission of any one, and the record expressly states that they were there "without the consent of the defendants," who themselves had not yet taken possession. But, to proceed with the record, Childs & Sons "removed the *greater part* of their

effects from said square in the late fall or early winter of 1893–'94, but did not remove entirely until May, 1895" (R., 17, 18). It will be observed that the defendants did not show that *any part* of these effects (which were left after the greater part had been removed in the fall or early winter of 1893–'94) had been left *upon lot 10.* It is said that certain old bricks and machinery were left upon the *square,* but they might well have been upon the square and yet not have been upon lot 10. The jury could not be allowed to *presume* that they were left upon lot 10. Adverse possession is not made out in this way. Only one witness undertakes to even hint at a probability of any of the old machinery being left upon lot 10. He says, " I don't know but what the rollers *might have been* on lot 10 " (R., 18, seventh assignment), and surely that is not the clear and satisfactory evidence such as is required in proof of adverse possession. To leave the fact in admitted doubt is the same as failing to prove it. We had nothing to do with anything left upon other parts of the square. It was no trespass against us unless this machinery was left on lot 10, and left there, too, *as indicia of claim to the land.* In other words, " the flag must be flying " from lot 10, and not from other lots upon the square which we did not claim.

This is absolutely and positively the only testimony as to anything being upon lot 10 after Childs gave up possession of the square in October, 1893, and moved to another brick yard, except an old brick kiln of which we shall hereafter speak. The court was asked to tell the jury in instruction No. 5 (R., 21, seventh assignment of error) " that they could not find that any part of the machinery was on lot 10 from the testimony of a witness who says, ' I don't know but what the rollers *might have been* on lot 10;' " but the instruction was refused and the jury consequently were permitted to find from such testimony that the rollers were *perchance* on the lot in question until May, 1895. If this be sufficient

testimony to establish an adverse possession, then we have read the text-books and reports to no purpose.

"The doctrine of adverse possession is to be construed strictly, and such possession cannot be made out by *inference*, but only by *clear* and *positive* proof" (1st Encly. of Law (2 ed.), p. 887, Title "Adverse possession," and see cases cited in note 2).

Again, the first attempt at occupancy made by the defendants was in November, 1893, when they put up some signs "For sale or rent," one of which was on lot 10, but how long is not shown (R., 18). It might have been taken off within the next ten days, for all that the record shows. Subject to whatever rights the defendants obtained by the erection of this sign on lot 10 for an unknown period, possibly for 24 hours, that lot (and in fact the whole square except that portion occupied by these rollers which, as we have seen, were not shown to have been left on lot 10) continued *entirely unoccupied and remained unoccupied* until "in the latter part of March or first part of April, 1894." Was this the continuous occupation such as the law of adverse possession requires? The old material left on the square was not shown to be on lot 10, and if it were there it is plain that the parties leaving it there set up no claim at that time to the lot. They had already sold to the defendants who had not yet taken possession, and the material was there *without their consent or agreement.* On or about the first of April the defendants rented the entire *square* to one John A. Downing, "who rented it for the purpose of converting it into a base-ball park, *but did not use it for that purpose.*" The only part of the square he claims to have occupied was lot 7. He says "the acts he did in reference to the occupation of the *vacant* ground" (that is, the rest of the square, including lot 10) were "that he prevented various parties from depositing tools, tool boxes, and railroad iron on the square, *though none was attempted to be deposited on lot*

10" (R., 18). It is plain from this witness' testimony that for the entire time during which he claims to have rented the *square* lot 10 was entirely *vacant* and an open common, and not a living soul was upon it in such manner that the plaintiffs could have sued them as trespassers. Downing continued to live in a house on lot 7, which he used as a dairy-lunch room until June, 1895, when he sold it (the lunch-room) to a Mrs. Schultz (R., 19), who continued in this lunch-house until the time of trial. She testifies that she "rented the house *with the privilege of using the entire square*, provided she neither placed nor permitted others to place anything *unlawful* upon it," and that she had stopped parties from dumping earth upon the square (it is not said of lot 10) and from driving across it, *though she made no use of it* (the square) herself (R., 19). The defendants seemed to think that proof of acts of authority over *any part* of the square would affect lot 10, but of course this is not the law. The plaintiffs claimed no part of the square, except lot 10. Until, therefore, lot 10 was interfered with in some open, notorious manner, under a claim of title to it, there was no adverse possession such as the law requires.

Here, then, is the testimony of defendants' own witnesses, showing conclusively that after "the latter part of March or first part of April, 1894," *no occupation of any sort* was had of lot 10, and yet to establish the defendants' case an open, notorious possession of it was necessary to have been shown down to March 8, 1895. We did not consider it necessary to encumber the case with an investigation as to how much longer lot 10 was vacant. For the purposes of the case the plaintiffs might well admit that there was complete occupation of lot 10 by the defendants during all the rest of the twenty years prior to April, 1894, but certainly no occupation of it was shown for one year *subsequent* to that period. That one year during which it was unoccupied was abundantly sufficient to break the continuity of the possession. The court should therefore have granted the first instruction.

He who comes into court defending his title upon the ground of adverse possession must make out his case for the full period. If for even *one day*, say the courts, it falls short of the statutory period, or there is a break in the possession that is enough to defeat his case. Even the Court of Appeals said the evidence "for the last two years was *somewhat meagre*."

The defendants claim, however, some sort of right from the fact that certain machinery and abandoned brick were left by Childs & Sons on the square, but Childs & Sons, it is conceded, left the square *long before* March, 1895 (to wit, "in the winter of 1893–'4, perhaps along in November, December, January, and February") (R., 19). If they left any old machinery or bricks it was not *under any claim to the land* that they left it, nor is it shown that these bricks were in March, 1895, on the square at all, to say nothing of lot ten.

The testimony as to these old bricks is on page 19 of the record and is as follows:

"After Isaac Childs & Sons left the square, which was in the winter of 1893–'4, *perhaps* along in November, December, January, and February, they sold certain brick kilns, some of which were on lot 10, to James D. Childs, who in turn sold them to others, by whom they were taken away [when taken away is not stated]; that said James D. Childs *did not claim the land said bricks were on*."

Observe that in the winter of 1893–'4 these brick kilns were sold to a man who let them stay on the land for some uncertain period (it may have been only ten days), *but did not claim the land*, so that no benefit can arise from these brick kilns as an adverse possession. It is plain that James D. Childs only wanted the *bricks* of which these old kilns were made and sold them as soon as he could find a purchaser. The defense did not undertake to show when the bricks in the old kilns were taken away by those who bought them from James D. Childs, but who was not one of the grantors of the

defendants nor in any way in *privity* with them. If the bricks were there as a part of the *defendants'* adverse occupancy, it was their duty to show *how long* they remained on lot 10, and not only that, but that they were kept on the lot either by the defendants themselves or their tenants or some one under whom they claimed as an *insignia of claim to the land*, and it is perfectly clear that they did not claim under James D. Childs, nor was he in any manner their tenant. The jury would not be permitted to *presume* that these bricks were there until March, 1895 (over a year). But whether there or not, the defendants do not claim to have had any right in them or to *have given any permission for them to stay there*, or that they knew anything whatever about them. James D. Childs' possession of these old bricks was not a possession of the land, for he made no claim to that (R., 19), but even if he did there was not, as we have said, the slightest *privity* shown between his possession and the possession of the defendants. Suppose the plaintiffs, seeing these bricks upon their land and fearing that the person to whom they belonged had placed them there under some claim of title to the land, had gone to James D. Childs, to whom they belonged, and asked him whether he had them there under any claim to plaintiffs' land, he would have replied, "No, I make no claim to the land. I am only claiming the bricks." The plaintiffs could then have replied, "We do not object to the bricks being there as long as you are not claiming any title to our property." If it be said that the defendants gave him permission to keep them there, the reply is that the record shows nothing of the sort, and the jury could not be permitted to presume that the defendants knew they were there, and permitted them to be kept there with the *intent* to claim a benefit from their being on the land.

In adverse possession *intent* is everything. A party cannot claim that something left on the land without his knowledge gives him the right to claim that their being there is evidence of *his intent* to claim the land, and even if

by a third party with whom he is not in privity.

he could he must show *how long they were* there, and there is no pretense that that was shown.

We submit, therefore, that as to at least the last year the evidence was not only "somewhat meagre," as the Court of Appeals designates it, but that there was no *legally sufficient* evidence tending to prove an adverse occupancy of lot 10, and unless there was evidence tending to prove such an occupancy as was "open and notorious," such as would have attracted the attention of the plaintiffs and justified them in suing the occupants as trespassers, there was no adverse possession.

SIXTH ASSIGNMENT.

This has reference to the error of the court in refusing to grant the instruction numbered four, which was as follows:

"The jury are instructed that no adverse possession of lot 10 has been shown against any of the plaintiffs who claim under Tracenia Latimer and Elizabeth T. B. McCormick, and their verdict must therefore be for the plaintiffs at least as to the interests which they claim under those persons."

It was conceded by the court below, and we believe it is not controverted by the defense, that as to the McCormick interest the suit was brought within ten years after the conveyance by Elizabeth McCormick and husband to their son, Millard. The question raised by this instruction therefore is, Was the interest claimed under Tracenia Latimer barred?

She became entitled to a right of entry on the death of Matilda Young, the life tenant, October 7, 1874. A short time after this, March 8, 1875, the adverse possession of Childs began. Mrs. Latimer died November 15, 1879, four years and eight months and seven days afterwards. The husband, Edwin Latimer, survived her until April 20, 1880, when for the first time the daughter, Lucy T. Davis, became

possessed of the right of entry. She brought this action May 19, 1895.

This court has never decided this precise question before, viz., what effect the intervention of the life estate of the husband has in estimating the period during which the statute must run before the right of the heir can be barred. Isaac Childs, it will be observed, entered during the lifetime of Tracenia Latimer and was in possession four years eight months and seven days at the time of her death. But for the intervention of the husband's life estate Mrs. Davis would have had fifteen years four months and twenty-three days within which to bring her action. Through no fault or disability of coverture or otherwise on her part she was denied by the law the right of entry until her father's death—five months and five days. Is that period to be counted against her, or was the statute suspended during that period (as in the case of war) to take up again its running on the beginning of her right of entry? We know that a great deal has been said about disabilities not being allowed to be piled upon each other, but it is not a question of *disability* on the part of Mrs. Davis; she was perfectly competent to sue, for it was her statutory separate estate, but she had no right of entry until the death of her father, Edwin Latimer. Is the time which the law would have given her within which to bring her action to be shortened because of the intervention of a particular estate for nearly six months? Had it been because of a war which closed the courts to her, this court would say that it would not shorten the period, but that the operation of the statute was suspended during the time of the war's existence, and yet the courts were as effectually shut to Mrs. Davis during this period as if war had existed.

Hanger *vs.* Abbott, 6 Wall., 532, 541.
The Protector, 9 Wall., 687.
Levi *vs.* Stewart, 11 Wall., 244.

So, too, in the case of Montgomery *vs.* Hernandez, 12 Wheat., 129, it was held that the time which elapsed while certain prior proceedings were suspended by appeal should be deducted, as it appeared that the injured party in the meantime "had no right to demand his money or to sue for the recovery of the same."

Is not the intervention of a life estate a perfectly analogous case? We know, also, that it has been said that when the statute once begins to run it is not stopped by a subsequent disability to sue, yet, as we have seen, war has been made an exception to this rule; but in the case at bar the statute, *had not begun to run*, for there never was a time from the date of the entry by Isaac P. Childs, in 1875, until the death of Edwin Latimer, in 1880, that Mrs. Latimer or her heir, Mrs. Davis, could have brought ejectment, Mrs. Latimer because of her coverture and Mrs. Davis because of her right of entry being suspended during her father's lifetime.

"The statute does not begin to run until there is some one to sue or liable to be sued."

Wood on Limitations (1 ed.), sec. 6, note 2, and cases cited.

Now, if the law suspended the right of entry, why should it not also suspend the operation of the statute? This exact question was so ruled by the supreme court of Pennsylvania in the case of Marple *vs.* Myers, 12 Pa. St., 122, and we submit that reason and justice is on the side of that case, and if its doctrine be adopted by this court, then the Latimer interest was not barred, for the 15 years 4 months and 23 days left to Lucy T. Davis after her mother's death, had the curtesy estate not intervened, should be counted from the date of the death of Edwin Latimer, April 20, 1880, which would have given her until September 13, 1895, to bring the action. As she brought it May 19, 1895, she was in abundant time.

ELEVENTH ASSIGNMENT.

The court granted the following instruction at the instance of the defense, and the same was duly excepted to by the plaintiffs:

"Unless the jury shall find that each of the plaintiffs under the plaintiffs' declaration as amended is entitled to recover, their verdict should be for the defendants," (R., 23).

As we have seen, the record shows that the interests of Tracenia Latimer (the mother of the plaintiff Lucy T. Davis) and Elizabeth McCormick vested on the death of Richard Young, subject to the life estate of his widow, Matilda. Richard died July 30, 1860, and Matilda, October 7, 1874; consequently the Latimer and McCormick interests were not affected by the married woman's act of 1869 (R. S. D. C., secs. 727, *et seq.*). They were therefore within the disability clause of the statute of limitations (sec. 2, Abert's Compl. Stats. D. C., 359) when the adverse possession of the defendants and those under whom they claim commenced March 8, 1875, both of them being then under coverture. Whatever may be said of the Latimer interest, the McCormick interest, which was held by Elizabeth McCormick until she and her husband conveyed February 28, 1887, to Millard P. McCormick, was not barred by the statute, for Millard had at least ten years from the date of his mother's conveyance to him in which to sue, and this action was brought eight years, two and a half months afterward.

By this ruling, therefore, Millard P. McCormick's interest was lost to him because he had joined with other plaintiffs whom the court held to be barred by limitations.

This ruling was founded upon Morris *vs.* Wheat, 8 Appeals Cases, D. C., 379, in which the doctrine was first announced by the Court of Appeals that where two or more plaintiffs sue in ejectment, if one of them cannot recover,

none can. Is this good law in the District of Columbia? We submit that since the passage of the act abolishing fictions in the pleadings in ejectment, section 809, R. S. D. C., it is so no longer. At common law, as we all know, the action of ejectment abounded in fictions. The plaintiff, John Doe, was a fiction; the lease to him was a fiction; the casual ejector, who was the defendant, Richard Roe, was a fiction; but these fictions served the useful purpose of avoiding the cost and delay of trying the title to land by the old writ of right. Accordingly, if A, B, and C, being seized as joint tenants of land, were ousted therefrom by D, the method of proceeding to recover the land was to bring an action of ejectment in the name of John Doe, and in the declaration to allege that he, John Doe, held the land under a joint lease or *demise* from the fee-simple owners A, B, and C, and that being in possession of the land and in the enjoyment of his term, Richard Roe (the casual ejector) had ejected him therefrom. D, the *true ejector*, was then served with notice of the suit, and, upon his agreeing to confess the fictitious lease, entry, and ouster, was permitted to defend the action. On the trial the fictitious plaintiff, John Doe, must of course show title to the land in his joint lessors, A, B, and C. Now, if it appeared that only A and B were joint tenants in fee, then no recovery could be had because A, B, and C were shown to have no *joint* title to demise, and as it was their demise only which had been "confessed" under the rule, of course, as the whole allegation of a demise was a fiction, it was out of the power of the plaintiff to prove any other, and his action failed. Thus Seargent Runnington says, in his work on ejectment published in 1795, and a standard authority of that day of the common law:

"Though by the modern practice the plaintiff is not obliged to prove the lease mentioned in the declaration (as by the ancient practice in most of the cases cited he was obliged to do), for that is *now* confessed by the rule, and by that means the mischief of any variance, between the lease

declared on and that produced and proved on the trial, is avoided; which was a danger the plaintiff was exposed to, and often miscarried in, by the old method of proceeding; yet in the modern practice the plaintiff must take care so to declare as suits with the real title to be sustained at the trial. So formerly, if there were several lessors, and the declaration was *quod demiserunt* the plaintiff was bound to show in them such a title that they might demise the whole; for the word *demiserunt* must be taken in pleading according to the legal sense it bears. So that if any of the lessors had not a legal interest in the whole premises, he could not in law be said to demise them, for it was only a confirmation, where he was not concerned in interest; and therefore the confession of the joint lease did not help, because he did not confess *the title*, by the rule."

Runnington on Ejectment, 221 (1st Am. E.).

Such was the common law as to joint tenants; but as to tenants in common a different rule prevailed. They were deemed not to be able to make a joint demise, but must demise their shares separately, and then the plaintiff declared on each demise in separate counts, when he could recover on one or more as he might prove himself entitled.

Runnington on Ejectment, 1 Am. ed., 222.

Tillinghast's Adams on Ejectment, 183, 187, 188.

Or the fictitious plaintiff, if it was preferred, might declare on separate demises; thus, the first count might be on a demise from A, B, and C, the second from A and B, the third from A and C, &c., and thus make out a title under at least one of the counts and recover on that count. This is shown in Adams on Ejectment, 189, where it is said:

"Where any doubt exists as to the party in whom the legal title is vested, it is usual to declare upon several distinct demises by the several persons concerned in interest and the claimants will not then be confined at the trial to one particular demise, but will be allowed to resort to any included in the declaration, under which they may be able to prove a title to the premises."

This was the case in Doe, dem. of Pool, *vs.* Errington, 1 Adolph and Ellis, 750, and in Doe, dem. Langdon, *vs.* Rowlston, 2 Taunt Rep., 441 (followed by Chief Justice Marshall in Doe, dem. Lewis *et al.*, *vs.* Barksdale, 2 Brock, 436–444), and in Fisher *vs.* Hughes, 2 Stra., 908, cited in Runnington on Ejectment, 213, and in the United States in Jackson, dem. Roman, *vs.* Sidney, 12 Johns., 185; Allen, etc., *vs.* Trimble, 4 Bibb's Rep., 21; Bevans, etc., *vs.* Taylor, etc., 7 Harr. and Johns., 1, and in Jackson, dem. Denberg, *vs.* Bradt, 2 Caines (N. Y.), 169. As will be seen, however, on reference to the cases decided in the United States, the strictness of the English rule was departed from by some of the State courts, at least so as to permit the plaintiff to allege a *joint* demise in two or more tenants in common and recover as the title might appear in one or more. (See especially Burrows' lessee *vs.* Nave, 2 Yerger (Tenn.), 227; Poole *vs.* Fleeger, 11 Pet., 185; Wheeler *vs.* Ladd, 40 Ark., 108; Jackson, dem. Roman, *vs.* Sidney, *supra*, and Jackson, dem. Denberg, *vs.* Bradt, *supra.*) In this last case there were two counts upon two demises, one a joint demise from three tenants in common and the other from one only. Kent, J., said:

"The last objection made by the defendant to the verdict was that no title corresponding with a joint demise by three of the lessors was shown. The title shown proves that the lessors of the plaintiffs are all tenants in common. *If this objection be well made the plaintiff is entitled to recover the proportion of the premises belonging to the lessor who demised separately.*"

So in Van Ness *et al. vs.* The Bank of the United States, 13 Pet., 17, 22, on writ of error to the circuit court for the District of Columbia. The action was ejectment. The declaration contained four demises purporting to have been made for the same premises by different lessors. The jury found for the plaintiff upon one of the demises, but said nothing of the other three, and the judgment of the court below was

entered in like manner upon the particular demise on which the jury found for the plaintiff, without taking any notice of the others.

Said Taney, C. J., speaking for the court:

"The verdict and judgment, it appears, are upon one of the demises only, and it is insisted that, as the jury did not find all of the issues committed to them by the pleading, the circuit court ought not to have entered a judgment for the plaintiff upon the issue found in his favor, but should have awarded a *venire de novo*, and that this irregularity in the proceedings may be taken advantage of upon a writ of error. It is not necessary to examine whether this objection could be maintained upon the practice and decisions of the English courts in relation to the action of ejectment. For the act of Congress of 1789, ch. 20, sec. 32, expressly provides, among other things, that no judgment shall be reversed for any defect or want of form, but that the courts shall proceed and give judgment according as the right of the cause and matter in law shall appear to them, without regard to any imperfections, defects, or want of form in the judgment or course of proceeding, except those specially demurred to. *Now, the demises laid in a declaration in ejectment are known to be fictitious and mere form;* and if the appellant had taken this objection in the circuit court, in arrest of judgment, the plaintiff would undoubtedly have been permitted to strike these demises from the declaration and thus obviate the objection."

And in Allen *vs.* Trimble, 4 Bibb (Ky.), at p. 25, it was held that in ejectment where there was a demise for one moiety from one lessor, and for the other moiety from the other lessor, if the title of one of the lessors is not proved, yet the plaintiff shall recover according to the title proved by the other lessor. The court said:

"It is true cases have occurred where, owing to the variance between the proof and the allegations in the declaration, a recovery has not been allowed, even according to the title; as for example, when the declaration contained a joint demise by two, and the evidence proved a title in one only; then because the expression *demised*, in the plural,

indicated an interest in both the lessors, it was held the proof did not correspond with the title alleged, and the plaintiff could not consequently recover. But as the decision in the case just mentioned *grew out of the artificial import of a joint demise, and turned on the variance between the proof and the allegation in the declaration*, that case has no application to the case before us; for in the present case plaintiff has properly declared on separate demises; and although the jury might not be of opinion he had manifested a title in each of his lessors, there can be no substantial objection to his recovery according to the title which they should be of opinion he had proven."

In the very case of Morris *vs.* Wheat, which is cited by the appellees as the authority for this ruling of the Court of Appeals, the first step was taken by the supreme court of the District of Columbia to carry out the logic of the statute abolishing fictions in ejectment in the District, for when that case was before it on its first appeal, upon the question whether tenants in common might join in ejectment, Mr. Justice Cox, delivering the opinion of the court, considered fully the law with reference to the changes brought about by the statute, and held that while at common law tenants in common could not join in a single count in ejectment, yet, as they might do so in separate counts, our statute did away with the necessity for separate counts, and tenants in common might now join in one count and one action, since the fiction of the demise, which prevented them from doing so at common law, was now abolished. We quote the following from that decision:

"Now in a number of text books, it is true as a general proposition, as asserted, that tenants in common cannot join in ejectment; but when we come to examine the cases referred to they amount simply to this: that separate demises must be alleged of the separate undivided interests of the tenants in common. * * * Now, the next question is whether our statute has made any difference in this respect, sec. 809 [R. S. D. C.] says:

"'*All fictions in the pleadings in the action of ejectment within*

the District are abolished; and all actions for the recovery of real estate shall be commenced in the name of the real party in interest, and against the party claiming to own or be possessed thereof.'

"It is not to be conceived that Congress meant to *restrict* parties in asserting their interest, but on the contrary the law would be interpreted *in the other direction.* If any change was made it would undoubtedly be in the direction of extending the rights of parties. The object of that statute, however, seemed to be simply to strike out fictions in pleadings and *leave the parties with the same right of action in their own names that they formerly had in their fictitious form.* That seems to be the true interpretation of this statute."

Wheat *vs.* Morris, 21 Dist. of Col., p. 11.

It is submitted, therefore, that the corollary of this conclusion that tenants in common may join in one count in ejectment is that they may recover just as they could at common law when the fiction compelled them to declare in separate counts, since the reason for nonsuiting the fictitious plaintiff in ejectment where one of the joint lessors was without title no longer exists. In other words, the declaration is to be treated precisely as if there were a fictitious plaintiff suing upon *separate counts*, alleging a demise from each of the real plaintiffs (the lessors) and allowing him (the fictitious plaintiff) to recover upon the counts supported by the evidence. Were it otherwise, tenants in common in this District would be placed in a worse position by the statute abolishing fictions in the pleadings than they were before its enactment, for before the statute they could all have joined in one suit, laying separate demises in separate counts, and have recovered according to their manifest titles without danger of nonsuit of all if one or more should be shown to have no title. The only way to avoid that danger now, if the ruling of the Court of Appeals is to prevail, is for each tenant to bring a separate suit. Thus, if there be five tenants, five suits must be brought,

for it must be remembered that they cannot now sue in separate counts (one plaintiff in each count), as was practicable at common law when the real plaintiffs were merely the lessors, and the fictitious plaintiff declared on their demises each in a separate count. As Mr. Justice Cox said in Wheat *vs.* Morris, 21 D. C., *supra:*

"It is not to be considered that Congress meant to *restrict* parties in asserting their interests, but on the contrary the law would be interpreted in the other direction. If any change was made it would undoubtedly be in the direction of *extending* the right of parties."

We have examined the authorities cited in Morris *vs.* Wheat, 8 Appeal Cases D. C., 379, upon which the decision in the case at bar is founded, and we find them all to be either cases decided upon joint demises of joint tenants or cases not in point. Of the first were Dickey *vs.* Armstrong, 1 J. J. Marsh, 30, and Cheney *vs.* Cheney, 26 Vt., 606, which cite cases founded upon joint demises. The case in Blatchford was a *nisi prius* case, and no authority was cited. The cases in Illinois and in 7th Cranch were rested upon the doctrine that in actions *ex delicto* the misjoinder of too many plaintiffs is a ground of nonsuit. This rule, however, cannot be applied to the action of ejectment, for it is neither an action *ex delicto* nor *ex contractu.* Some have called it a mixed action, but it really partakes of neither; it is *sui generis.* At all events, we have seen that it was not because of the rule of misjoinder of plaintiffs (for there was never but *one* plaintiff, John Doe) that the action failed. It was because "John Doe" had alleged his title to be founded on a *joint* demise—for example, of A, B, and C—and in the proof it appeared that there was no such demise.

"The demise declared upon by the plaintiff, in the modern practice, is fictitious only; but still it must be consistent with the title of his lessor; that is to say, such a demise must be supposed to be made as would, if actually made, have transferred the right of possession to the lessee. Thus if

there be several lessors, and a joint demise by them all be alleged, such a title must be shown at the trial, as would enable each of them to demise the whole; because if any one of the lessors have not a legal interest in the whole premises, he cannot in law be said to demise them."

Adams on Ejectment, 186.

But, as we have seen under our statute abolishing fictions in the pleadings, there is no longer any joint demise to confound and confuse the parties. The action is now upon the *merits*, and the real parties in interest, when they show title, must be allowed to recover, just as they would have recovered at common law had the declaration alleged the fiction of separate demises in separate counts. To hold otherwise would be to apply a rule growing out of a fictitious state of facts to a case where the fictions are abolished and the real facts stated.

For these various errors which we have assigned the judgment should be reversed and the case remanded for a new trial.

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Attorneys for Appellants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 246.

LUCY T. DAVIS ET AL.

vs.

LOUIS COBLENS ET AL.

Brief of Plaintiffs in Error in Reply to Brief of Defendants in Error.

Plaintiffs in error deem it their duty to the court and themselves to point out, by way of reply, some of the errors of fact and of law contained in the brief of defendants in error.

I.

In the first place, on page 2 of their brief it is said:

"Some three-quarters of a century after these transactions [viz., the invalid execution sale] it occurred to one John H. Walter and Bartow L. Walker, *who appear to have been engaged extensively in speculation in old titles*," &c.

What is the purpose of this language, even if supported by the record, and emphatically it is not? We might ad-

mit that these two gentlemen were not only speculators in old titles, but in addition thereto were bank-robbers, highwaymen, and cut-throats, and yet that fact can have not the slightest relevancy to the case at bar. The question is, Have the defendants had twenty years' adverse possession of the plaintiffs' land and were the plaintiffs given a fair trial in the court below? That Messrs. Walter and Walker were speculators in old titles, even if such conduct were the foulest of crimes, can have nothing to do with the real issue. Why, then, was it made a subject of cross-examination before the jury (supposing it to be true) and again brought before this court if not for the one and only purpose of injecting into the minds of the jury and this Court the virus of prejudice against the witness. Do the learned counsel believe that this distinguished tribunal is not above being influenced in this way in the determination of causes, and therefore resort to such methods here? We submit that the very fact that the same reprehensible practice is resorted to in their brief in this court only strengthens our argument that the purpose of the cross-examination was vicious, and that in permitting it the trial court abused the discretion which is given it to allow a cross-examination to extend sometimes to matters not touched upon in the examination-in-chief. It is a species of contempt of court when the resort to such a practice is purely for the purpose of getting improper prejudices into the jury-box, and it is a submission to such contempt when the court permits it to be done.

II.

Defendants' counsel argue (p. 7 *et seq.* of their brief) that our eighth and ninth assignments of error, viz., the refusal of the court to grant our instruction No. 6, and, secondly, in giving it to the jury as modified by the court (Rec., 21), are not well taken, because (*a*) "No precedent, it is believed, exists for this requirement that a trial court shall select

particular items of the evidence testified to by a single witness * * * and shall (sic) instruct the jury that they are bound to believe his statement."

In the first place, the court was not asked by this instruction to tell the jury that they were "bound to believe his [Walter's] statement." The court was merely asked to say to the jury "that there was no testimony in this case tending to rebut the testimony of the witness Walter" upon the fact in question, "and that the jury would not be justified in finding to the contrary." The instruction was asked in view of the evident attempt, by the unfair and illegal cross-examination referred to, to throw discredit upon Mr. Walter's positive statement that he *knew* that he had not conveyed lot 10, a statement which, if false, could instantly and easily have been contradicted by producing the recorded deed from the office of the recorder of deeds. We were entitled to be protected by this instruction from any influence that this unfair cross-examination may have had upon the jury. But if it be true that the court ought not to select "particular items of the evidence testified to by a single witness * * * and instruct them that they are bound to believe his statement" (although that was not what we requested), what shall be said of the action of a trial court which, after refusing so to instruct, turns immediately round and, picking out this particular witness and referring to his testimony, tells the jury that "the weight to be given it" is a proper question for the jury? If the first was wrong, surely the second was doubly wrong. We did not ask the court to single out this witness and tell the jury that the *weight* to be given his testimony was a proper question for them, as if there were some doubts about the weight to be given it. If the court had told the jury that the weight to be given the testimony of *all* the witnesses was a proper question for them, we would not have objected, but it is throwing a *cloud*, so to speak, over a witness who has not been contradicted in the slightest degree when the court tells them that they

have a right to disbelieve him, notwithstanding no one has attempted to contradict him. It "savors" too much of an invitation to the jury to do so.

(*b.*) Again, the argument of defendants' counsel (p. 8 of their brief) that "the point becomes wholly immaterial in view of the verdict," because "only partial interest of any of the plaintiffs rested upon the deed from Walter," is wholly untenable. Who can say that the action of the court did not induce the jury to reject Walter's testimony *in toto*, and thereby (although they might have believed the defendants to have failed in showing a full twenty years' adverse possession) to find against *all* the plaintiffs because of their failure to prove that lot 10 had not been conveyed by Walter. It was the *sine qua non* of our case that Walter had not conveyed lot 10, and if the jury were led by this objectionable instruction, backed up by the reprehensible cross-examination, to find that he had, our case was lost, no matter though the jury believed the defendants had failed to prove adverse possession.

III.

Defendants' counsel claim (p. 9 of their brief) that the docket entries were properly admitted as "constituting in part the color of title under which the defendants claimed." Was it offered as such? Not at all. The record declares no reason for the offer; but if it had been, in what way could it have been tortured into a "part" of their color of title? Where was the other "part"? Not the marshal's deed, for that was sufficient of itself to constitute color of title. Moreover, the names in the marshal's deed and in the docket entries were not identical. Anthony Holmead, *Junior*, was the grantee under whom they claimed, as shown by the deed, while the docket entries showed a judgment in favor of Anthony Holmead. The deed recites the issuance of a

fi. fa. February 28, 1820, while the docket entries recite a *fi. fa.* issued in *June* term, 1820. The deed recites a levy and *sale* July 31, 1820, while the docket recites a *levy only*. Color of title has been defined to be "that which has the *appearance* of title, but which in reality is no title at all" (Wright *vs.* Mattison, 18 How., 50; Beaver *vs.* Taylor, 1 Wall., 637). If on its face it has not the "appearance" of title it is not color of title, as, for instance, a tax deed void upon its face (Redfield *vs.* Parks, 132 U. S., 239, and cases there cited). Now, where was any appearance of title in Anthony Holmead, Junior, shown by showing a judgment against a man not *identical* in name and which does not even show a *sale* of the lot claimed? Mr. Ridout, it is true, was called to eke out these "entries" by having him testify that lot 10 was levied on, "among other lots," under the *fi. fa.* issued "in said cause," but he does not, it is to be observed, testify that the record showed any *sale* of lot 10, nor, indeed, of any other lots under the said levy. Besides this, as we have shown in our principal brief, the other discrepancies in dates, amounts, &c., show it *on its face* not to be a judgment against Richard Young in favor of the identical person named as grantee in the marshal's deed.

But it is said that we stated no grounds for the objection to the admission of these docket entries, and therefore cannot complain of the court's action. It is submitted, however, that when it is apparent that a paper is not admissible *upon any ground whatever* it is not necessary to state the grounds of objection. It is only where there are apparently good grounds for admitting a paper until the *special* ground for its exclusion is pointed out that the rule relied upon by defendants' counsel applies.

IV.

From pages 10 and 11 of defendant's brief we quote:

"It is said that the bricks which remained on lot ten were simply left there by Childs, not sold by him to the defendants; *but this cannot alter the effect as to the notice* which they gave of adverse possession."

We submit that in making this statement of the effect of these bricks upon lot 10, sight is entirely lost of the *facts* of the case.

Isaac P. Childs & Bro. had sold lot 10 to the defendants Coblens & Lauer, and had left the lot. Coblens & Lauer had not taken possession and did not take possession for some time (about 3 years or so) afterwards. These bricks were on this lot for some time (how long does not appear) during the interval of Isaac P. Childs leaving and Coblens & Lauer taking possession. Consequently the bricks were not there as a sign, or notice, of adverse possession by *any one*, for Isaac P. Childs & Son were *then* making no claim to the land, and Coblens & Lauer, who did claim it, had not yet taken possession. The latter did not even know that the bricks were there. They had not authorized them to be put there or left there, and James D. Childs, the man who owned them (an entire stranger to Coblens & Lauer), distinctly says that although he allowed the bricks to stay there for an uncertain period, *he did not keep them there as a notice of any claim to the land.* Nor was any attempt made to show that either Isaac P. Childs & Son or Coblens & Lauer claimed (at the time in question) that they knew the bricks were there. How, then, could their mere presence upon the lot be notice that Coblens & Lauer were claiming our ground? If we had sued them in trespass for keeping these bricks there they could have defended successfully by showing that they had not authorized them to be placed there, and did not know of their being there, and

had no property interest in them whatever. Then, if we had hunted up James D. Childs, the man who, it is admitted, owned the bricks, he would have replied to us, "It is true my bricks are on lot 10, but I expect to take them away soon, and I don't claim that I own the land." To which we could well have replied, "Since they are not on our lot as a sign of adverse possession, we have no objection to letting them remain there." How in the world it can be claimed by any intelligent lawyer that the presence of these bricks under such circumstances upon our lot was notice to us *of Coblens & Lauer's claim* passes our comprehension.

V.

Again, defendant in error (p. 11) claims a benefit from the alleged payment of taxes, and cites the case of Ewing *vs.* Burnett, 11 Pet., 41, to the effect that payment of taxes, when accompanied by possession, is evidence of a *claim* of title, a sound doctrine in the law of adverse possession, and one which we are very far from disputing; but no court has ever said that payment of taxes, when unaccompanied by *possession*, can of itself consummate in the party paying them a title to the property. We all know the law to be that mere proof of possession without proof that the possession was accompanied by a *claim of title* does not constitute proof of adverse possession. It therefore becomes important, after a defendant in ejectment has proved possession by himself or those under whom he claims for the requisite period of time, to go further and show that he or they were at the time of the possession *claiming title* to the land. This is often difficult to prove in the case of deceased persons, except by showing that they paid the taxes during that period, and the courts very properly hold such payment to be evidence that the adverse occupant was for the time he paid them *claiming* the land. But if A occupies a piece of land for twenty years, except for an

interval of "even one day," say the courts, it is not a *continuous* possession, and though he had paid taxes during the entire period, he would not have acquired title by adverse possession. So in the case at bar. The defendants show a continuous possession by those under whom they claim for about seventeen years; then a long break of from at least six months to three years is shown. Of what avail is it to them that they were paying taxes during that period of three years, or even that they were publishing in the newspapers and from the housetops the fact that they were claiming the land, if they were not at the same time in *possession* of the land?

VI.

On pages 13 and 14 of defendants' brief it is said that—

"At the trial and in the Court of Appeals, as is shown by the opinion of the latter tribunal, the objection to the rejection of this fourth instruction was based solely upon the ground that Mrs. Davis was a *femme covert* at the death of her mother, Mrs. Latimer, and therefore entitled to the same protection as the latter against the operation of this statute. *In this court for the first time an additional point is raised,*" &c.

It is respectfully submitted that it was because the Court of Appeals and the trial court failed to notice all the points made in the argument of counsel (as courts have frequently done before and will do again—*humanum est errare*) that we are here endeavoring to get them recognized and passed upon. It would be a strange doctrine which held that because a court failed to consider all the points made by counsel to sustain his objection to an instruction to the jury, therefore the upper court must take the same course and consider only those which appear from the lower court's opinion to have been considered. Counsel for defendants

seems to fail to distinguish between the *objection* itself and the *argument* or points made to enforce the objection. Their contention, if upheld, would often compel the distinguished counsel who argued cases at this bar to confine themselves to the same argument made by their less experienced juniors in the court below. We do not desire, however, to be understood as saying that such is the fact in the case at bar. We only insist that all the objections raised in this court were raised in the court below. What the arguments were to sustain them in the court below of course cannot appear in the record, and the fact that the court in its opinion does not mention them is by no means evidence that they were not made.

VII.

The claim made by the defendants (p. 18 of their brief), even if it be true, that tenants in common must file separate suits—a point expressly decided to the contrary in Wheat *vs.* Morris, 21 Dist. of Col., 11—can have no bearing here, for the reason that the value of each one-fifth interest exceeds $5,000, as appears by the affidavit hereto annexed and several others which we have filed with the clerk, not considering it necessary to print more than one, since they are all to the same effect.

Respectfully submitted.

FRANKLIN H. MACKEY,
W. MOSBY WILLIAMS,
Attorneys for Appellants.

over

CITY OF WASHINGTON, *District of Columbia,* } ss:

Thomas G. Hensey, being duly sworn, deposes and says that he is the senior member of the firm of Thomas G. Hensey & Co., of the city of Washington, District of Columbia, real-estate agents and brokers; that he has been in the real-estate business in said city about fifteen years; that he is acquainted with the value of real estate in square 1031 and the vicinity, in said city of Washington, and that the fair market value of lot 10, in said square, is from 70 to 75 cents per square foot; that said lot contains, according to the official surveys, 36,498 square feet of ground.

THOS. G. HENSEY.

Subscribed and sworn to before me this 11th day of April, A. D. 1899.

MELVILLE D. HENSEY,

[SEAL.] *Notary Public, D. C.*